HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 1649 (S/B)/2002

Kamlesh Chandra

vs.

State of Uttaranchal
and others.

Approved for reporting.

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~~Not approved for reporting~~

Date of decision 25.11.2003.

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 1649 (S/B)2002

Kamlesh Chandra ….Petitioners

Vs

State of Uttaranchal

And others. ….Respondents

Counsel for the petitioner Shri S.K. Mandal

Dated:-25-11-2003

Hon'ble Rajesh Tandon, J.

Heard counsel for the petitioner Shri .S.K Mandel , Shri Rakesh Thapliyal counsel for the Union of India, Miss Bina Pandey counsel for the State of U.P. and Shri B.D. Kandpal and Shri Moulakhi for the State of Uttaranchal.

Parties have agreed that the writ petition may be disposed of finally.

By the present writ petition the petitioner has prayed for the issue of a writ of mandamus praying for the following reliefs:-

(a) Issue, A writ order or direction in the nature of mandamus directing, and commanding the respondents to relieve the petitioner for state of U.P from Uttaranchal without any further delay.

(b) Issue, A writ of direction in the nature of mandamus directing the Respondent No. 3 to given joining to the petitioner in any officer of Medical department in U.P. and

pay him full and regular salary with all consequential service benefits.

Brief facts giving rise to the present writ petition are that the petitioner was appointed by the Director Medical and Health Service Department, U.P. through selection committee after going through a competitive examination. The petitioner has stated that his services are of State cadre and it can be transferred anywhere in the state of U.P.

The petitioner has stated that he was appointed on 16-2-96. The appointment letter shows as under:-

स्वास्थ्य सेवा महा निदेशालय में प्रयोगशाला तकनीशियन के पद पर नियुक्ति हेतु गठित चयन समिति की संस्तुति के आधार पर संलग्न सूची में उल्लिखित अभ्यार्थियों को उत्तर प्रदेश प्रयोगशाला तकनीकी संवर्ग के अन्तर्गत प्रयोगशाला तकनीशियन के पद पर रु01320–1560द. रो–40–3040 के वेतनमान में अस्थाइरुप से नियुक्त किया जाता है। यह नियुक्ति पूर्णतया अस्थाई होगी। सम्बन्धित प्रयोगशाला तकनीशियन को संलग्न सूची में उनके नाम के सामने दर्शाये गये स्थान पर तैनात किया जाता है, तथा नियुंक्त किये गये अभ्याथिर्यो को दो वर्ष की परिवीदाा अवधि पर रखा जायेगा। कार्य एवं आचरण सन्तोषजनक पाये जाने की स्थिति में इस अवधि को आगे बढ़ाया जा सकता है। उक्त वेतनमान में वेतन के अतिरिक्त समय समय पर जारी शासनादेश के अनुसार अनुमान्य महंगाई भत्तें देय होंगें।

यह संवर्ग प्रदेश स्तर का संवर्ग है। अतः जनहित में इन्हें प्रदेश के किसी भी चिकित्सालय में सीनान्तरित किया जा सकता है।

At the time of a filing of the writ petition on 22-11-02 following order was passed by the bench consisting of Hon'ble Mr. Justice Irshad Hussain, J.

> ***"Heard Sri.S.K. Mandal, learned counsel for the petitioner and learned Addl. C.S.C. List after two weeks.***
>
> ***Meanwhile, the respondents are directed either to relieve the petitioner within two weeks of show cause by the next date of listing as to why he is not being relieved."***

It has been informed that the order dated 22-11-2002 has not been complied with so far.

According to the petitioner he was appointed by the Director, Medical and Health Service Department, U.P. through selection Committee. The petitioner has stated that he was appointed in the State cadre not in the Hill Sub-Cadre and the services of the petitioner are transferable anywhere i.e. within the State of Uttar Pradesh. The petitioner has stated that at the time of the formation of new state of Uttaranchal the state of U.P. has called the options from the petitioner.

In pursuance of the options invited by the Govt. the petitioner has submitted his option paper before the appropriate authority on 30-9-2000 within time and opted for the state of U.P.

In paragraph 7 it has been stated that on 5th October 2001 the secretary Medical Health and Family welfare Uttaranchal Government Dehradun has written a letter to the Reorganization Commissioner Uttaranchal Government that the petitioner may be relieved for the State of U.P. The contents of the letter are quoted below:-

" राज्य सेवा संवर्ग के अधिकारियों/ कर्मचारियों को उत्तर प्रदेश राज्य के लिये कार्यमुक्त किये जाने के सम्बन्ध में।

राज्य सेवा संवर्ग के अधिकारियों का उत्तर प्रदेश के लिये कार्यमुक्त किये जाने के सम्बन्ध में महानिदेशक ,चिकित्सा स्वास्थ्य एवं परिवार कल्याण, उत्तरांचल द्वारा राज्य सेवा संवर्गो में कार्यरत अधिकारियों/ कर्मचारियों को उत्तर प्रदेश राज्य हेतु कार्यमुक्त किये जाने का प्रस्ताव निर्धारित प्रारंभ पर उपलब्ध कराया गया है।

इस सम्बन्ध में मुझे यह कहने का निर्देश हुआ कि संलग्न की जा रही सुचियों में उल्लिखितये जिनमें चीफ फार्मसिस्ट 01, जिला सहायक प्रति रक्षण अधिकारी 01, नेत्र सहायक 02, मलेरिया निरीक्षक 01, उपवारिका20, आकुपेशन थैरोपिस्ट01, पी0टी0 02, लिपिक 28, कापर 01, खाघनिरीक्षक 05, अवर अभियन्ता 04, एन0एम0एस0 (कुष्ट) 10, एन0एम0ए0 85, स्वास्थ्य षिक्षा अधिकारी 01, अन्वेषक कम संगणक 26, लैव टक्नीशियन 92, डी0सी0सी0 22 व उपचारिका 26 को उत्तर प्रदेश राज्य के लिये कार्यमुक्त करने की सहमति प्रदान करने का कष्ट करें।"

The petitioner has stated that the appointing authority of the petitioner is not divisional officer of Kumaon Division and Garhwal Division. The appointing authority of the petitioner being of State level, the respondents are empowered to relieve the petitioner.

The stated has filed the counter affidavit in paragraph 2. It has been stated as under:-

" That in reply to the contents of para 1 of the writ petition, it is submitted that the petitioner can be relieved to the State govt. of U.P. only when his option regarding the same could be finalized by the Central Govt. it is pertinent to mention here that the representation of the petitioner praying to relieve him for the State of U.P. was forwarded by the Director Genera, Medical Health and Family Welfare, Uttaranchal Dehradun on 30th August 2001. True photocopy of the letter dated 30th August 2001 is beig filed herewith and marked as Annexure No.C.A.I to this affidavit. That in

pursuance of the recommendation of the Director General the Secretary, Medical Health and Family Welfare, Uttaranchal Shasan recommended the matter to the Reorganization Commissioner, Uttaranchal Govt. Lucknow on 5th October 2001 and the same is still pending their. True photocopy of the order dated 5th October 2001 is being filed herewith and marked as Annexure NO. C.A. 2 to this affidavit."

Further in paragraph 6 of the counter affidavit it has been stated that in pursuance of the circular dated 11th September 2001, the person who's appointing authority is the Divisional Level Officer, and who is working in the territory of Uttaranchal shall be deemed to be finally allocated to the state of Uttaranchal. At the same time in paragraph 6 it has further been stated that Central Govt. has been directed to treat each and every application on individual basis. Relevant paragraph is quoted below: -

<u>Paragraph- 6</u>"That in reply to the contents of paragraph 9 of the writ petition, it is submitted that the Central Govt. vide its circular dated 11th September 2001 has provided that the person who's Appointing Authority is the Divisional Level Officer, and who is working in the territory of Uttaranchal shall be deemed to be finally allocated to the State of Uttaranchal. However, the same was challenged before this Hon'ble Court and directions were issued by which the Central Govt. was directed to treat each and every application on individual base and to decided the same."

In paragraphs 7 and 8 of the counter affidavit the respondent has stated that the option of the petitioner for the state of U.P. has yet not been finalized. Relevant paragraph is quoted below: -

Paragraph- 7 ***" That the contents of paragraph 10 of the Writ petition are misconceived, erroneous and hence are strongly denied. It is submitted that the option of the petitioner for the State of U.P. has not yet been finalized and the petitioner has knowingly and deliberately did not made the Union of India as a party."***

Paragraph- 8 ***" That the contents of paragraph 11 of the writ petition, it is submitted that that the petitioner can only relieved to the State of U.P. when his option is finalized."***

In ***reply*** to the counter affidavit the petitioner has filed a Rejoinder Affidavit. In paragraph 7 of the rejoinder affidavit. It has been stated that the Uttaranchal Govt. has relieved number of employees and the technicians have been relieved for the state of U.P. Paragraph 7 of the Rejoinder Affidavit is quoted below;-

" That the contents of paragraph no. 8 of the counter affidavit is not correct as stated hence denied. In reply it is stated that the respondent Uttaranchal Govt. has relieved number of candidates by pick and choose method and some lab technicians has filed the writ petition and contempt petition compliance of the order passed by this Hon'ble Court they have been relieved for State of U.P. and the contents of paragraph no.11 of the writ petition is affirm and reiterated."

The petitioner has also placed reliance on the list prepared for relieving the employees for the State of U.P. List is a part of Annexure-3 of the writ petition where the name of the petitioner has also been mentioned.

Both the parties have relied upon the Court order dated 11 September 2001 passed under Section sub-clause 3 of the U.P. reorganization act 2000. The order reads as under:-

" उत्तर प्रदेश पुनगंठन अधिनियम 2000 की धारा (73) के उपखण्ड (1) द्वारा प्रदत्त शक्तियों का प्रयोग करते हुये केन्द्रीय सरकार एत द्वारा निर्देश देती है कि ये सभी अधिकारी और कर्मचारी।

(क) जिसका उत्तर प्रदेश पुनर्गठन अधिनियम, 2000 की धारा (73) मे विनिदिष्ट 13 जिलो में से एक जिला स्तर अधिकांश नियुक्ति प्रधिकाी है और जो दिनांक 9 नवम्बर 2000 को और उसके बाद उत्तरांचल राज्य में प्रति है अथवा सेवायें उपरिनिादिष्ट जिला क्षे.त्रो के भीतर सामान्यत स्थानातरण हेतु अधिन है। अथवा

(ख) जिसकी नियुक्ति प्राधिकारी दिनांक 9 नवम्बर 2000 को और उसके बाद उत्तराचल राज्य के गढवाल और कुमाउ डीवीजन का एक प्रभागीय स्तर का अधिकारी है अथवा जिनकी सेवाये उपर्युक्त डिवीजन तथा जिसकी सेवायत स्थानतरण हेतु अधीनस्य है अथवा

(ग) जी 9 नवम्बर 2000 से तत्काल पूर्व विघमान उत्तरॉचल राज्य के हिल सब काडर से सम्बन्धित तथा जिसकी सेवायें 9 नवम्बर 2000 से तत्काल पूर्व विघमान उत्तर प्रदेश राज्य के हिल सब काडर जिलो के अन्दर सामान्यत स्थानतरण हेतु अधिनस्त है अथवा

(घ) जी दिनांक 9 नवम्बर 2000 के और उसके बाद उत्तरॉचल राज्य के राज्य क्षेत्र के भाग में विषेश परिचायक अथवा हेतु नियुक्ति है और जिनकी सेवायें 9 नवम्बर 2003 को और उसके बाद उत्तरॉचल राज्य के राज्य क्षेत्र के भाग भैगोलिक क्षेत्र के सामान्यत स्थानान्तरण योगय नही है।

9 नवम्बर और उसके बाद उत्तरॉचल राज्य भी रूप से किये जात है।"

According to the petitioner none of the clause of the order dt. 11 September 2001 applied in the case of the petitioner due to following reasons: -

(i) The petitioner was appointed by the State of U.P. in the State Cadre.

(ii) He was appointed much before in the cadre of State of U.P.

(iii) He has neither been appointed nor has given his consent for Hill sub cadre.

(iv) The services of the petitioner were transferable within the state cadre of State of U.P.

Section 73 of the Uttar Pradesh Re-organization Act, 2000 provides that every person shall continue to serve provisionally and thereafter the Central Government shall determine the final allocation for service. Section 73(1),(2),(3) reads as under:-

"Provisions relating to other service.- (1) Every person who immediately before the appointed day is serving in connection with the affairs of the existing state of Uttar Pradesh shall, on and from that day provisionally continue to serve in connection with the affairs of the State of Uttar Pradesh unless he is required, by general or special order of the Central Government to serve provisionally in connection with the affairs of the State of Uttaranchal.

Provided that every direction under this Sub-section issued after the expiry of a period of one year from the appointed day shall be issued with the consultation of the Governments of the successor States.

(2) As soon as may be after the appointed day, the Central Government shall, by general or special order, determine the successor State to which every person referred to in sub-section (1) shall be finally allotted for service and the date with effect from which such allotment shall take effect or be deemed to have taken effect.

(3) Every person who is finally allotted under the provisions of sub-section (2) to a successor State, shall, if he is not already serving therein be made available for serving in the successor State from such date as may be agreed upon between the Governments concerned or in default of such agreement, as may be determined by the Central Government."

As will appear from section 73(1) of the U.P. Reorganization act 2000 that the decision was to be taken within a period of one year from the appointed date but no decision has been taken so far according to section 73(1) of the Reorganization Act since the petitioner was employed in the State of U.P, by virtue of deeming clause he will be treated to provisionally continue to serve in connection with the affairs of State of Uttar Pradesh:-

"The advisory committee has been constituted under Uttar Pradesh Reorganization act 2000 by virtue of section 76 of the act. It reads as under: - "Advisory Committees. - The Central Government ma, by order, establish one or more Advisory Committees for the purpose of assisting it in regard to –

(a) the discharge of any of its functions under this part; and

(b) the ensuring of fair and equitable treatment to all persons affected by the provisions of this Part and the proper consideration of any representations made by such persons.

As will appear from Section 76 that the advisory committee has been empowered to ensure fair the equitable treatment to all persons affected and the Act also provides the consideration of any representation made by such persons.

Counsel for the petitioner has also referred section 77 of the Uttar Pradesh Reorganization Act 2000 with referred to the power of the Central Government. It reads as under: -

"Power of Central Government to give directions- The Central Government may give, such directions to the State Government of Uttar Pradesh and the State Government of Uttaranchal as may appear to it to be necessary for the purpose of giving effect to the foregoing provisions of this Part and the State Government shall comply with such directions."

As will appear from Section 77of the aforesaid act that the central government shall give directions to the state government either U.P. or Uttaranchal. The word therefore "may" has to be treated as "shall". The advisory committee of the central government therefore has to complete the exercise of the final allocation of the cadre of the employees.

The grievance of the petitioner is that he may be directed to be relieved in pursuance of sub-clause 2 of section 73 of the Act, for State of Uttar Pradesh for which he has given his option.

In Writ Petition No.457 (S/B) 2003 Udai Pratap Singh Vs. State of U.P. the Division Bench of this Court has passed the following order:-

" Under Section 73(2), the Central Government is given the power to allocate the cadres by general or special order of allotment between the two States. Section 76 provides for setting up of an Advisory Committee to assist the Central Government. By the impugned order dated 11th September 2002, the Central Government

has issued directions allocating the various cadres between the two states. The Central Government has issued these directions pursuant to the authority given by the Legislature to the Central Government."

" The Central Government had constituted an Advisory Committee under Section 76. That Committee submitted its report on 28th April 2001/10th May 2001. Their report has been accepted by the Central Government as indicated by letter dated 4th September 2001 (annexure-4). We may clarify that the report of the Advisory Committee has not been fully accepted by the Central Government."

The Division Bench in Writ Petition No. 451(S/B)/2003 Narendra Kumar Vs. State of Uttaranchal has passed the following order:-

"Under Section 73 of the U.P. Reorganization Act, 2000, final allocation of all State Services personnel between the successor States shall be decided by the Central Government. Till date, that decision has not been taken. Therefore, the petition is premature."

Similar matter was also decided by the Bench consisting of Hon'ble P.C Verma J. His Lordship has passed the following order:-

"Heard Learned Counsel for the parties. The controversy is squarely covered by the order passed by Division Bench of this Court in W.P. No. 1426 (S/B) of 2001, Mulayam Singh Vs. State of Uttaranchal and others, on 3-6-2003. The petitioners are also relegated to approach the Advisory Board with fresh representation and same be disposed of as observes in the aforesaid writ petition. With the aforesaid observation, the writ petition is disposed of."

In the light of the aforesaid observations the petitioners are permitted to make their representations before the Advisory Committee of Union of India.

The Counsel for the Union of India has submitted that the Advisory Committee of the Central Government is taking suitable steps to finally allocate the persons who have given their options for the State of U.P. The petitioner, therefore, is directed to approach the Advisory Committee who shall consider the same in accordance with law.

The petitioners apprehend that they will not be heard by the Advisory Committee for relieving the petitioners in accordance with their options. The apprehensions are misconceived. Suffice it to state that it is rule of natural justice that no one should be condemned unheard.

In the case Smt. Maneka Gandhi vs. Union of India and another, AIR 1978 SC 597, the Apex Court has observed as under:

"It is well established that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action.

" In England, the rule was thus expressed by Byles J. In Cooper Vs. wandsworth Board of Works: (1863) 14 CB (NS) 180:

"The laws of God and man both give the party an opportunity to make his defence, it he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called

upon to make his defence. Adam (says God), "where are thou? Hast thou no eaten of the tree whereof I commanded the that thou shouldest not eat." And the same question was put to Eve also."

The judgment in the case of Menaka Gandhi (supra) has been followed in the case of West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. JT 2002(7) SC 578, relying upon the case of Mrs. Maneka Gandhi VS. Union of India & Another, 1978 (1) SCC 248 as under:

"The right of audi alteram partem is a valuable right recognized even under the India Constitution . See Mrs. Menaka Gandhi Vs. Union of India and another, 1978(1) SCC 248 wherein it is held, the principle of the maxim which mandates that no one should be condemned unheard; is a part of rule of natural justice. We have already held that such right of hearing conferred by a statute cannot be taken away even by courts."

The advisory committee of the Union of India, as well as state of Uttaranchal are directed to take steps forthwith to decide the representation of the petitioner in accordance of the provisions of Section 73(1), 76,77 as well as in accordance with the direction of the Division Bench of the Uttaranchal High Court with regard to the relieving of the petitioner in accordance with the option given by the petitioner. The representation of the petitioner shall be disposed of within a period of 6 weeks after the production of the certified copy of the order.

With the aforesaid observations the writ petition is disposed of. There will be no order as to costs.

(Rajesh Tandon, J.)

25-11-2003

Mohit